THE COURT'S CHARGE

[1231] THE COURT: Members of the jury:

(1) Gloria M. Lohman, the plaintiff, is in this case against the General American Life Insurance Company demanding $100,000 under the double indemnity terms of the insurance policy carried with her husband, William D. Lohman, it being in full force and effect at the time of his death on July 10, 1967. She is also in conjunction therewith claiming interest at the legal rate of six per cent.

Her theory and that of the additional defendants, Federal Deposit Insurance Corporation and Federal Deposit Insurance Corporation, as statutory receiver of Cedar Vale National Bank, is that the gun shot wound causing his death, was the result of an accident and that the double indemnity provisions for that reason can and should be enforced.

The General American Life Insurance Company, on the other hand, for its defense, aside from a general denial, advances suicide as the cause and Gloria's claim, therefore, not to be allowed.

(2) Gloria's proof, during the course of the trial, that William died instantly as the result of a bullet from his gun entering the head is not in dispute. Also not controverted is the scene depicted in the photographs and explained in the testimony showing parts of his brain, fragments of his skull and skin inside and outside of the cab of the pickup truck and the locations of the body
[1232] and the rifle after death.

(3) That scene, explained as it has been in the evidence and as used in the arguments, is with the rules and

observations in these instructions, your only guidelines, as you proceed towards and for a verdict of death by accident as it is covered in the policy, or a verdict by means other than accidental which would include the asserted defense of suicide.

(4) As you give effect to those guidelines, you are instructed that the burden of proof is on Gloria, by a preponderance of the evidence, to show the death to have been caused by accident. However, this rule does not require proof to an absolute certainty, since proof to that extent is seldom possible in any case, and she is not required to prove the exact means by which the rifle could have been discharged, which in different language can be expressed as a rule that accidental death can be established by evidence, either direct or circumstantial.

(5) Suicide having been injected against the claim of accidental death, you are instructed that it under the law of this state is an improbable event and generally so recognized in the light of common experiences of mankind, thus leaving it for you, the jury, under this record to have it enter into your deliberations, but to give it such weight only as it may deserve, with proof thereof, as you find it, in the evidence, either direct or circumstantial.

[1233]

(6) As you apply those guidelines to the asserted defense of suicide and any motive for it, you are to consider not only all of the evidence showing the cause or causes for the closing of the Cedar Vale bank on July 8, 1967, Lohman's reactions to that event, to his partner Oltjen's bogus bank operations, to the concern on his part as to civil liability and possibility of criminal prosecution, and on the basis of it all, did it, as asserted by the General

American Life Insurance Company, two days after closing, lead to suicide.

As against that claim also within those guidelines is Gloria's, that her husband's death on July 10, 1967, under the terms of the policy was the result of an accident and that it could not have been otherwise in view of his personality as it has been described, the extent of his assets, real and personal here and elsewhere, the extent also of his cattle feeding operations, his credit standing and the confidence in him by others, all permitting a conclusion against self-destruction.

(7) Evidence has been received as to state-
[1234] ments made by William D. Lohman and of transactions had with him during his lifetime. You are instructed that evidence as to such statements and transactions purportedly had or made with a deceased person should be received with great caution and careful scrutiny as no class of evidence is more subject to error or abuse. This is because witnesses, even those with the best of intentions and motives, generally are unable to recall the exact language of an admission or statement and are, therefore, liable by change of a word to give a false impression of the language which had been used. Such evidence, accordingly, under this rule is only to have the weight it deserves.

(8) You are further instructed that the credibility of Ray D. Oltjen, whose deposition has been read into evidence, may be considered as you decide on the weight or credit that evidence should have, since he prior to the time of his deposition had been convicted of a felony involving moral turpitude.

(9) Again, you are instructed that every person under the laws of this state and Kansas, who shall obtain or attempt to obtain, from another any money or property by means or by use of any false or bogus check, draft, or by any other means, instrument, or device, shall be guilty of a felony and upon conviction to be punished as provided by law.

(10) Certain legal terms, the import of which may not be familiar to you, are hereby defined: (1) "burden of proof", as used in these instructions, is
[1235] meant the obligation resting upon a party to prove the truth of an allegation made by him which is denied by the opposing party; (2) "Preponderance of the evidence" is meant the greater weight of the evidence or the value thereof. This is determined not alone by the greater number of witnesses testifying to or for a disputed fact, but is that evidence which in your judgment is the more credible and has to your minds a greater and more convincing force, and (3) "evidence" is whatever is admitted in the trial of the case as a part of the record, whether it be an article or document, or other instrument marked as an exhibit, or other matter formally introduced and received, a stipulation, or the testimony of the witnesses who have appeared as such during the course of this trial, to which I will add that there are two types of evidence from which the jury may properly find the truth as to the facts of a case. One is direct evidence, such as the testimony of an eyewitness; the other is indirect or circumstantial evidence—proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

[1236] As a general rule, the law makes no distinction between direct and circumstantial evidence.

but simply requires that the jury find the facts in accordance with the preponderance of all of the evidence in the case, both direct and circumstantial.

(11) A presumption is a rule of law which permits the jury to find the existence of one fact from proof of another fact. It continues in effect until overcome or outweighed by evidence to the contrary; but if it isn't, the jury should find in accordance with the presumption, but if you do, you must keep in mind that the facts giving rise to such a presumption must have been established by a preponderance of the evidence.

(12) The rules of evidence ordinarily do not permit a witness to testify as to opinions or conclusions. A so-called expert witness is an exception to this rule. A witness, who by education and experience has become expert in any art, science, profession or calling, may be permitted to state his opinion as to a matter in which he is versed and which is material to the case, and may also state the reasons for such opinion.

You should consider the expert opinions received in evidence in this case and give them such weight
[1237] you think they deserve; and you may reject all or any of them entirely if you conclude the reasons assigned in support are unsound, or if you feel them, or either of them, to have been outweighed by other evidence.

(13) Although you as jurors are the sole judges of the facts, you are duty bound to follow the law as stated in these instructions of the court, and to apply the law so given to the facts as you find them from the evidence before you.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

Neither are you to be concerned with the wisdom of any rule of law. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the court.

No language used by the court in these instructions, and no statements, remarks, or rulings made during the progress of this trial shall be considered by you to mean that the court entertains any opinion in relation to any of the facts in the case or what your verdict should be.

[1238] You will disregard all evidence excluded or stricken from the record during the progress of the case, and you are not to give the same any consideration whatsoever in arriving at your verdict.

(14) Statements and arguments of counsel, whether made in the opening statements, elsewhere during the progress of the trial, or in the final arguments do not constitute evidence and must not be regarded as such. It is otherwise if such statements are in the form of admissions or stipulations of fact in which event the matters covered by the language stand as a fact or facts conclusively proved.

Unless you are otherwise instructed, anything you may have seen or heard outside the courtroom is not evidence, and must be entirely disregarded.

You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited to the bald statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify, but you are permitted to draw from facts which you find have been proved such reasonable inferences as seem justified in the light of your experience.

[1239] (15) You are the sole judges of the weight of the evidence, the credibility of the witnesses, and the conclusions to be drawn from the facts and circumstances proved. In passing on the credibility of the witnesses and in weighing their testimony, you may and should consider their appearance and conduct on the witness stand; their interest or lack of interest in the results of the trial; their motives, if any, actuating them as witnesses, their candor, fairness, bias or prejudice, their knowledge, recollection and means of knowledge of the matters whereof they speak; the reasonableness or probability of their statements or want thereof and each fact and circumstance proved, thus giving to the testimony of each witness and to each fact and circumstance such weight and such only as ought reasonably and justly be given in view of all of the evidence.

You should consider and compare the proof which tends to support the claims of the respective parties and reason upon the same as jurors of intelligence and common sense, and return true verdict according to the evidence and the instructions now given you by the court.

(16) Other rules to be applied may be summarized: (1) your verdict is not to be based on sympathy or prejudice for or against either party; (2) your verdict should be for the plaintiff, Gloria M. Lohman, and the additional defendants, Federal Deposit Insurance Corpora-
[1240] tion and Federal Deposit Insurance Corporation, as statutory receiver of Cedar Vale National Bank, if under this record you find William D. Lohman's death to have been caused by an accident, and otherwise for the defendant insurance company if you find his death not to have been caused by accident, or under this record, a suicide; (3) the verdict rendered must represent the con-

sidered judgment of each juror, in other words, each one of you must agree on the one you render; and (4) the verdict must be unanimous.

(17) Upon retiring to the jury room, you will select a foreman who will preside over your deliberations and be your spokesman in court; he or she will see to it that discussion is carried on in an orderly and proper manner; that all issues are fully and freely discussed; that every juror is given an opportunity to express his or her views and that balloting is properly performed.

The form of verdict to which I have referred is to be dated and signed by your foreman after you shall have reached a unanimous decision.

If, during your deliberations, it becomes necessary to communicate with the court, you should make your request in writing, deliver it to the deputy marshal, and he in turn will deliver it to the court. Do not at-
[1241] tempt to make communication in any other manner, and bear in mind also that you are not to reveal to the court or to any person how the jury stands, numerically or otherwise, until you have reached a unanimous verdict.